IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. [redacted] 117

THE GAS SERVICE COMPANY,
Petitioner,

vs.

OTTO R. COBURN, on Behalf of Himself and All Others Similarly Situated,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

KIRKE W. DALE
205 Home National Bank Building
Arkansas City, Kansas 67005
*DALE M. STUCKY
1600 Wichita Plaza
Wichita, Kansas 67202
Attorneys for Petitioner

ROBERT L. COLEMAN
700 Scarritt Building
Kansas City, Missouri 64142
PAUL R. KITCH
GERRIT H. WORMHOUDT
1600 Wichita Plaza
Wichita, Kansas 67202
Other Attorneys for Petitioner

*Counsel upon whom service is to be made.

E. L. MENDENHALL, INC., 928 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030

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Comes now The Gas Service Company, a public utility, incorporated under the laws of the State of Delaware, authorized to do business in the State of Kansas, and petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit, affirming an order of the United States District Court for the District of Kansas, which order overruled petitioner's motion to dismiss for lack of federal jurisdiction.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. A1-A6) is reported at 389 F. 2d 831. The opinion of the district court (App. B, *infra*, pp. A9-A17) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 1968 (App. A, *infra*, p. A7). Petitioner's Petition for Rehearing and Application for Hearing En Banc thereof were denied on March 26, 1968 (App. A, *infra*, p. A8). The jurisdiction of this court is invoked under 28 *U.S.C.* 1254 (1).

QUESTION PRESENTED

Whether under Rule 23, *Federal Rules of Civil Procedure*, as amended in July, 1966, aggregation of several and distinct claims is now permitted for the purpose of satisfying the diversity jurisdictional amount requirement of 28 *U.S.C.* §1332, when aggregation was not allowed prior to such amendment?

STATUTE AND RULES INVOLVED

28 *U.S.C.* 1332 provides in pertinent part as follows:

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

* * *

"(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in

the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff."

Amended *Rule* 23 of the *Federal Rules of Civil Procedure* is set forth in full in Appendix C, pp. A20-A23.

Rule 82 of the *Federal Rules of Civil Procedure*, as amended February 28, 1966, effective July 1, 1966, provides in pertinent part as follows:

"These rules shall not be construed to extend or limit the jurisdiction of the United States District Courts or the venue of actions therein. * * *"

STATEMENT

An appeal was allowed by the court below from an order of the United States District Court for the District of Kansas, overruling petitioner's motion to dismiss a class action. The motion attacked the complaint for insufficiency of the jurisdictional amount required by 28 *U.S.C.* 1332, as amended (R. 5)*

Respondent Otto R. Coburn, the only named plaintiff, resides in the vicinity of Arkansas City, Kansas. The petitioner is a Delaware corporation authorized to do business in Kansas. It markets natural gas to residents of the State of Kansas, including respondent Coburn. The complaint alleges that Coburn and other persons exceeding 18,000 in number reside outside of the city limits of various cities in the State of Kansas, and that he and

*"R." refers to the Xerox record in the court of appeals transmitted from the district court.

other members of this class have purchased natural gas from petitioner continuously since 1954 (R. 1-2).

Complaint is made that petitioner has individually billed and collected from Coburn and other members of the class an illegal municipal franchise tax in addition to the proper rates payable otherwise. The complaint further alleges that the exact amount of the unlawful charges collected from all members of the class is unknown, but that the aggregate total of such illegal charges which respondent seeks to recover for the class far exceeds the sum of $10,000 (R. 3).

Petitioner moved to dismiss in the district court on the ground that the complaint failed to satisfy the $10,000 jurisdictional amount required by 28 *U.S.C.* 1332. The motion to dismiss was accompanied by an affidavit showing that the total franchise tax collected from respondent Coburn from April, 1964 through February, 1966 amounted to $7.81. At the hearing on petitioner's motion to dismiss, it was stipulated that counsel for respondent were not aware at that time of any member of the class whose individual claim would equal or exceed $10,000 (R. 5, 7-8, 18).

The trial court issued a memorandum in which it directed that an order be prepared and filed overruling appellant's motion to dismiss (R. 9-18). In its order of June 23, 1967, overruling the motion, the district court authorized an interlocutory appeal under 28 U.S.C. 1292(b). Timely application therefor was made, and leave to appeal was granted by the circuit court on July 26, 1967 (R. 19, 20).

The circuit court concisely stated the issue here involved as follows:

> "The determinative question is whether under Rule 23, Fed. R. Civ. Pr., as amended in July 1966, aggrega-

tion of several and distinct claims is permitted for the purpose of satisfying the diversity jurisdictional amount requirement of 28 U.S.C. §1332 where a class action under the amended rule is otherwise appropriate." (App. A, p. A2).

The court below answered the question in the affirmative, after conceding that aggregation of the claims here involved was not permissible under former *Rule* 23.[1] It specifically declined to follow the holding in *Alvarez* v. *Pan American Life Insurance Co., et al.*, 5 Cir., 375 F. 2d 992, certiorari denied, 389 U.S. 827, that the amendment to *Rule* 23 had no effect upon jurisdiction. In its petition for rehearing, which was denied, respondent called attention to the apparent conflict between the decision herein and decisions of this Court and with the language of this Court in amended Rule 82 of the *Federal Rules of Civil Procedure* (C.R.[2] 6, 10).

REASONS FOR GRANTING THE WRIT

1. The holding of the court below, that claims under amended *Rule* 23 may now be aggregated to satisfy the jurisdictional amount required in diversity cases, was explicitly recognized as in direct conflict with the decision of the Court of Appeals for the Fifth Circuit in *Alvarez* v. *Pan American Life Insurance Co., et al., supra.* There, as in the present case, a class action was pleaded and the plaintiffs contended that under amended *Rule* 23 their claims, although separate and distinct, should be aggregated in order to satisfy jurisdictional amount. The Court of Appeals of the Fifth Circuit carefully considered the con-

1. "Because the claims of the individuals constituting the class in the case at bar are neither 'joint' nor 'common' this action under Rule 23 before amendment would not have been classified as a 'true' class action and aggregation of claims would not have been permitted. * * *." (App. A, p. A4).

2. "C.R." refers to the certiorari record transmitted from the court below.

tention and concluded with the following pertinent language:

> "In sum, it would appear that the principle of aggregation falls within the scope of jurisdiction which has been traditionally left to Congress rather than in the rule making power delegated to the Supreme Court by Congress. It follows that the principle is valid and subsisting notwithstanding new Rule 23. This conclusion is a recognized limitation on the full utility of the class action procedure in federal courts where some members of the class have claims in the jurisdictional amount and some do not. However, the law seems clear and an accommodation of jurisdiction to the class action procedure, if deemed necessary, is a question which addresses itself to the Congress or the Supreme Court." 375 *F.2d* 996.

Certiorari was denied in the *Alvarez* case prior to the decision herein, 389 *U.S.* 827. With respect to the holding in *Alvarez* the court below squarely said, "*We must disagree*" (emphasis ours) (App. A, p. A5). Four days after the decision herein, the Court of Appeals for the Eighth Circuit in *Snyder* v. *Harris*, 390 F.2d 204, held that aggregation is not permitted under amended *Rule* 23, relying upon the *Alvarez* case and the opinion of the trial court, 268 F. Supp. 701 (U.S.D.C., E.D. Mo. 1967).

As the matter now stands, litigants filing under the federal system may aggregate claims in class actions in Kansas City, Kansas, but may not do so in Kansas City, Missouri. The uncertainty created by the conflicting standards among circuits necessarily places in jurisdictional limbo all pending and prospective class suits in the United States district courts in which aggregation of claims is necessary to satisfy 28 *U.S.C.* 1332. Further proceedings in the instant case may be an exercise in futility unless the jurisdictional question is first resolved.

2. The holding of the court below is in conflict with decisions of this Court and with its admonition expressed

in amended *Rule* 82 of the *Federal Rules of Civil Procedure*, that the rules are not to be construed to extend federal jurisdiction. Although this Court has not yet had occasion to pass upon the effect of amended *Rule* 23, the identical questions of policy and of law were considered in *Sibbach* v. *Wilson & Co.*, 312 U.S. 1 and in *United States* v. *Sherwood*, 312 U.S. 584 at 589-590. *See also, Clark* v. *Paul Gray*, 306 U.S. 583; *Gibbs* v. *Buck*, 307 U.S. 66. In *Sibbach*, the Court marked out the limitations upon its rule making authority as follows:

> "Hence we conclude that the Act of June 19, 1934, was purposely restricted in its operation to matters of pleading and court practice and procedure. Its two provisos or caveats emphasize this restriction. The first is that the court shall not 'abridge, enlarge nor modify substantive rights,' in the guise of regulating procedure. The second is that if the rules are to prescribe a single form of action for cases at law and suits in equity, the constitutional right to jury trial inherent in the former must be preserved. *There are other limitations upon the authority to prescribe rules which might have been, but were not mentioned in the Act; for instance, the inability of a court, by rule, to extend or restrict the jurisdiction conferred by a statute.*" 312 *U.S.* at page 10 (Emphasis ours)

In *Clark* v. *Paul Gray*, *supra*, a class action, the Court said:

> "It is a familiar rule that when several plaintiffs assert separate and distinct demands in a single suit, the amount involved in each separate controversy must be of the requisite amount to be within the jurisdiction of the district court, and that those amounts cannot be added together to satisfy jurisdictional requirements. Wheless v. St. Louis, 180 U.S. 379, 45 L. ed. 583, 21 S. Ct. 402; Rogers v. Hennepin County, 239 U.S. 621, 60 L. ed. 469, 36 S. Ct. 217; Pinel v. Pinel, 240 U.S. 594, 60 L. ed. 817, 36 S. Ct. 416; Scott v. Frazier, 253 U.S. 243, 64 L. ed. 883, 40 S. Ct. 503. * * *" 306 *U.S.* 583 at 589.

3. The implications of the decision below reach beyond the provisions of amended *Rule* 23. The 1966 amendments to the *Federal Rules of Civil Procedure* make substantial changes in *Rules* 18, 19 and 20, all dealing with joinder of claims or of parties. If, as the court below in effect concluded, considerations germane to judicial administration are to override statutory jurisdictional standards in the application of amended *Rule* 23, then the same considerations should, with any consistency, govern all provisions in the *Rules* dealing with the joinder of claims and of parties.

CONCLUSION

Because the decision rendered below creates a conflict between the circuit courts of appeal, decides a federal question in a way in conflict with applicable decisions of this Court, and decides an important question of federal law which has not been, but should be, settled by this Court, the petition for a writ of certiorari should be granted.

Respectfully submitted,

KIRKE W. DALE
205 Home National Bank Building
Arkansas City, Kansas 67005
DALE M. STUCKY
1600 Wichita Plaza
Wichita, Kansas 67202
Attorneys for Petitioner

ROBERT L. COLEMAN
700 Scarritt Building
Kansas City, Missouri 64142
PAUL R. KITCH
GERRIT H. WORMHOUDT
1600 Wichita Plaza
Wichita, Kansas 67202
Other Attorneys for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

January Term, 1968

THE GAS SERVICE COMPANY,
Appellant,

vs.

OTTO R. COBURN, on behalf of himself and all others similarly situated,
Appellee.

No. 9635

Appeal from the United States District Court for the District of Kansas

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Gerrit H. Wormhoudt (Robert L. Coleman, Kirke W. Dale and Paul R. Kitch were with him on the brief) for Appellant.

William V. Crank (D. Arthur Walker, Richard E. Cook, George B. Collins, Robert Martin, K. W. Pringle, Jr., W. F. Schell, Robert M. Collins, W. L. Oliver, Jr., Tom C. Triplett, Thomas M. Burns and Peter J. Wall were with him on the brief) for Appellee.

Before WOODBURY*, LEWIS and HICKEY, Circuit Judges.

LEWIS, Circuit Judge.

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*Of the First Circuit, sitting by designation.

This is an interlocutory appeal authorized in compliance with 28 U.S.C. § 1292(b) to allow appellate consideration of an order of the District Court for the District of Kansas denying appellant's (defendant's) motion to dismiss appellee's (plaintiff's) complaint for lack of jurisdiction. The determinative question is whether under Rule 23, Fed. R. Civ. P., as amended in July 1966, aggregation of several and distinct claims is permitted for the purpose of satisfying the diversity jurisdictional amount requirement of 28 U.S.C. § 1332 where a class action under the amended rule is otherwise appropriate.

This action was brought by plaintiff, on behalf of himself and all others similarly situated, against defendant to recover back all amounts allegedly unlawfully charged by defendant for gas sold to customers for consumption outside the city limits of various Kansas municipalities. Defendant's charges are said to be revenues on city franchise rights imposed in addition to a volume charge for gas and are alleged to have been arbitrarily extended and charged to customers residing outside city limits. Plaintiff is such a customer and is one of a class of more than 18,000 other customers similarly situated. The complaint contains conclusionary allegations that joinder of the numerous class members is impractical, that plaintiff's claim is typical of the claims of the class members, that questions of law and fact are common to the class, that the action will fairly and adequately protect the interests of the class, and that the action is cognizable under Rule 23. It is conceded that neither plaintiff nor any member of the class has an individual claim exceeding $10,000, and that such individual claims are variable in amount[1] but would aggregate to more than $10,000.

1. By affidavit in support of the motion to dismiss, defendant asserts that the total collected from plaintiff for franchise taxes was $7.81.

The trial court found, and it seems indisputable, that plaintiff's action definitely meets each prerequisite to a class action as presently set out in Rule 23(a) and one or more of the additional requirements of 23(b).[2] The class is numerous, a single question of law is presented common to the class, the claim of the class and any defense thereto is typical, and the interests of the class will be

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2. The amended Rule 23 provides in part:

"(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

adequately protected. So, too, it is apparent that a class action is superior to other available methods for a fair and efficient adjudication of the controversy. The class has a high degree of cohesion and the stake of each individual is so small that separate suits are obviously impractical. In mixed terms, it may be said that pragmatically the case presents an ideal class action.

Because the claims of the individuals constituting the class in the case at bar are neither "joint" nor "common" this action under Rule 23 before amendment[3] would not have been classified as a "true" class action and aggregation of claims would not have been permitted. *See* Aetna Ins. Co. v. Chicago Rock Island & Pac. R.R., 10 Cir., 229 F.2d 584. The Fifth Circuit in Alvarez v. Pan American Life Ins. Co., 375 F.2d 992, has held that this result is still dictated after adoption of the new rule. Citing Clark v. Paul Gray, Inc., 306 U.S. 583, and in reliance upon the compulsion of Rule 82, Fed. R. Civ. P.,[4] the Fifth Circuit reasoned that to hold otherwise would result in the expansion of federal jurisdiction, as Judge Bell aptly phrases it, in "a *sub silentio* manner." 375 F.2d at 995. We must respectfully disagree.

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3. The rule then provided in pertinent part:

"(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

4. "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. . . ."

It is true, of course, that the rule-making power does not include the right to create or abrogate substantive law and that as a consequence no rule can lift or lower the $10,000 restriction upon federal jurisdiction. But it has long been established that the jurisdictional amount may be met by aggregation when the matter in controversy is of the required value. In Gibbs v. Buck, 307 U.S. 66, 72, the Supreme Court stated it thus:

> ". . . federal jurisdiction will be adequately established, if it appears that for any member, who is a party, the matter in controversy is of the value of the jurisdictional amount, or, if to the aggregate of all members in this representative suit, the matter in controversy is of that value."

Rule 23 before or after amendment does not purport to affect this principle.

The amendment to Rule 23 did contemplate very comprehensive change in the procedural aspects of class suits and to effectuate such change many guidelines set down in earlier judicial rulings must now be questioned in application of the amended rule.[5] The Advisory Committee's Note, 39 F.R.D. 98, places great emphasis on the fact that the amended rule is intended to eliminate the nice judicial distinctions and concomitant case law confusion that had arisen from a classification of class actions as "true," "hybrid," and "spurious." "In practice," said the Committee, "the terms 'joint,' 'common,' etc. which were used as the basis of the [old] Rule 23 classification proved obscure and uncertain." These terms were eliminated in the amendment and a purely pragmatic classification was adopted.

5. Clark v. Paul Gray, Inc., 306 U.S. 583, may well be such a case and certain it is that the Fifth Circuit so considered it. However the Supreme Court seems to have there rejected the factual background as supporting a class action at all and for reasons that would be equally applicable for the dismissal of that case under the amended rule.

The rule now recognizes that the procedural tool of a class action must be workable if it is to be desirable. To now hold that the former classifications of "true," "hybrid" and "spurious" must be perpetuated to allow or defeat aggregation would seem to render the rule sterile in that regard.

We find comfort for our view in Provident Bank v. Patterson, ... U.S. ....., decided January 29, 1968, wherein Mr. Justice Harlan, writing for a unanimous Court, considers amended Rule 19 and rejects the following argumentative syllogism: "(1) there is a category of persons called 'indispensible parties'; (2) that category is defined by substantive law and the definition cannot be modified by rule; (3) the right of a person falling within that category to participate in the lawsuit in question is also a substantive matter, and is absolute." Similarly we believe the elimination of categories of class actions in Rule 23 involves no substantive change and is no bar to the application of aggregation of claims to establish monetary jurisdiction. The basic jurisdictional question is whether aggregation under *any* circumstances can meet the legislative mandate pertaining to the monetary restriction on federal jurisdiction. This question has been answered in the affirmative, Gibbs v. Buck, *supra*, and it follows, under the new rule, that when a cause clearly falls within its terms as a class action, as here, the claims of the entire class are in controversy.[6]

The judgment is affirmed and the cause remanded for further proceedings.

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6. Professor Wright considers this to be a realistic view. He states:

"The amended rule nowhere refers to a 'joint' or a 'common' interest. It would be convenient if it should be held that, since the judgment is binding under the amended rule on the entire class, the claims for or against the whole class are in controversy. This would be an entirely realistic view, and one entirely consonant with the stated purpose of the amount in controversy requirement. . . ."

JANUARY TERM, FRIDAY, FEBRUARY 23rd, 1968.

Before Honorable Peter Woodbury, Honorable David T. Lewis and Honorable John J. Hickey, Circuit Judges.

The Gas Service Company, Appellant, 9635 vs. Otto R. Coburn, on behalf of himself and all others similarly situated, Appellee.	Appeal from the United States District Court for the District of Kansas.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Kansas and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed and the cause remanded for further proceedings.

MARCH TERM, TUESDAY, MARCH 26th, 1968.

Before Honorable Peter Woodbury, Honorable David T. Lewis and Honorable John J. Hickey, Circuit Judges.

Gas Service Company, a Delaware corporation, Appellant, 9635 vs. Otto R. Coburn, on behalf of himself and all others similarly situated, Appellee.	Appeal from the United States District Court for the District of Kansas.

This cause came on to be heard on the petition of appellant for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition for rehearing be and the same is hereby denied.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

OTTO R. COBURN, et al.,
Plaintiff,
vs.
GAS SERVICE COMPANY,
Defendant.

No. T-4172

Memorandum and Order

Plaintiff Coburn, a citizen of Kansas, on behalf of himself and all others similarly situated, brought this action against defendant Gas Service Company, a Delaware Corporation, with principal offices and place of business in Kansas City, Missouri, alleging that the amount in controversy exceeds $10,000, and that defendant markets gas to citizens of Kansas having their residence and burner-tip outlets outside the city limits of various cities in the State of Kansas, and that plaintiff is one of the defendant's customers so situated. It is further alleged that the persons constituting the class similarly situated with plaintiff exceed 18,000 in number and are so numerous that the joinder of all members is impracticable; that there are questions of law and fact in this action common to the class; the claim of the plaintiff is typical of the claims of other members of the class; and the prosecution of this action by the plaintiff will fairly and adequately protect the interests of the class. It is further alleged that there exists one or more of the conditions described in sub-divisions (1), (2) and (3) of Rule 23(b), Federal Rules of Civil Procedure, and by reason thereof the action is properly brought by the plaintiff as a class action.

It is further alleged that plaintiff along with the other members of the class have purchased natural gas from defendant for consumption outside of the city limits of any incorporated city and that defendant has charged them, billed them and has been paid for a large volume of natural gas consumed; that the charges included, and plaintiff and other members of the class have been compelled to pay, an additional charge designated as a "franchise tax"; that the billing and collection of the apportioned amount of said tax to the plaintiff and those in his class is unlawful and unauthorized because such "franchise tax" are revenues or duties on city franchise rights of defendant which it has arbitrarily extended and charged to customers at points outside the city limits; it is further alleged that the amount of unlawful charges collected by defendant from plaintiff and members of the class is in excess of the jurisdictional amount of $10,000; plaintiff prays that the Court determine this to be a class action properly instituted under Rule 23 of F.R.C.P.

Defendant has filed a motion to dismiss on the grounds that plaintiff's complaint predicates jurisdiction upon 28 U.S.C. §1332 which requires that an action between citizens of different states, the amount in controversy shall exceed the sum of $10,000 exclusive of interest and costs. Attached to the motion and made a part of it is the affidavit of an officer of the defendant corporation stating that plaintiff Coburn's pro rata share of franchise tax from April 1964 to February 1966 inclusive, amounts to $7.81. No challenge is made of plaintiff's contention that the total amount so collected and received by defendant from all members of the class exceeds the sum of $10,000.00. Defendant further alleges that for purposes of determining the amount in controversy herein the claim of the plaintiff cannot be aggregated with the claims of any other persons similarly situated.

Thus, brought into sharp focus is the question of whether the amounts claimed to be recoverable by the class, in event plaintiff's claim is sustained for the class, may be aggregated for the purpose of sustaining the Court's jurisdiction.

The action is sought to be maintained under Rule 23 of the Federal Rules of Civil Procedure as amended, which amendment became effective July 1, 1966. This Court has endeavored to get a fair statement of reasons for changing the rule, but after considerable research concludes that the Advisory Committee's note found at 39 F.R.D. 98 describes the terms used by the Court as a basis for classification of various kinds of class action and states that they proved to be obscure and uncertain and so an amended rule describing "in more practical terms the occasion for maintaining class actions" and providing that all class actions maintained to the end as such will result in judgments including those whom the Court finds to be members of the class, whether or not the judgment is favorable to the class, and refers to the measures which can be taken to assure the fair conduct of these actions.

Whether the situation has been improved by the establishment of amended Rule 23 remains to be seen. The problem presented in this case remains to be spelled out.

The Advisory Committee observed that the categories of class actions in the original rule were defined in terms of the abstract nature of the rights involved: the so-called "true category" was defined as involving "joint, common, or secondary rights"; the "hybrid" category, as involving "several" rights relating to "specific property"; and the "spurious" category, as involving "several" rights effected by a common question and related to common relief. It was thought that the definitions accurately de-

scribed the situations amenable to the "class suit device" and also would indicate the proper extent of the judgment in each category, which would in turn help to determine the res judicata effect of the judgment if questioned in a later action. The Committee also observed that in practice the terms "joint", "common", etc., which were used as the basis of the Rule 23 classification proved obscure and uncertain, and that the Courts had considerable difficulty with these terms. It was further observed that the Rule did not provide an adequate guide to the proper extent of judgments in class actions.

It was noted by the Committee that the original Rule did not squarely address itself to the question of the measures that might be taken during the course of the action to assure procedural fairness, particularly giving notice to members of the class, which may in turn be related in some instances to the extension of the judgment to the class.

The Court's research on this problem includes its consideration of the statement by Professor Wright found on page 89 of the 1966 pocket part to Volume 2, Barron & Holzoff's Federal Practice and Procedure, wherein he discusses directly the problem now before the Court. He says:

> "The greatest difficulty comes with regard to jurisdictional amount. As a function of the general principle that aggregation is permitted by parties jointly or commonly interested, but not where claims are several and distinct, it was held under the former rule that aggregation of the claims of all members of the class was permitted in 'true' class action, where the rule required a 'joint' or 'common' interest, but not in 'hybrid' or 'spurious' class action. The amended rule nowhere refers to a 'joint' or a 'common' interest. It would be convenient if it should be held that, since the judgment is binding under the amended rule on

the entire class, the claims for or against the whole class are in controversy. This would be an entirely realistic view, and one entirely consonant with the stated purpose of the amount in controversy requirement, to avoid having the federal courts 'fritter away their time in the trial of petty controversy'. A good deal of ancient learning will have to be forgotten, however, if this practical and sensible result is to be reached.

"If the Courts continue to apply the ancient learning, it will be necessary to consider in each case, in which the claims of the named representatives are not themselves for more than $10,000, whether the interests involved are 'joint' or 'common', an inquiry which is frequently quite difficult and which it was a purpose of the amended rule to avoid. If the interests are joint or common, then the relation of the parties will be such that their action would fall under (b) (1), but it does not follow that all (b) (1) actions will involve joint or common interests."

Before the amendment to Rule 23, a class action brought on behalf of numerous persons having a *joint* or *common interest* or *title* in the subject matter of the suit could, where the value of the interest involved exceeded the jurisdictional amount, be maintained in a Federal District Court. *Clark* v. *Paul Gray, Inc.*, 306 F.2d 323, *Bolsenberg* v. *Chicago Title & Trust Company*, 128 F.2d 245, Anno. 141 A.L.R. 565.

On the other hand, where the right exists in favor of many as against one, or in favor of one as against many, and in its nature is separable, then the separable values could not be added together to make the jurisdictional sum, and the separable value furnished the jurisdictional test. *Elliott* v. *Empire Natural Gas Co.*, 4 F.2d 493, 497, *Clark* v. *Paul Gray, Inc.*, (supra).

It is reasonable to conclude that the able and competent persons who were responsible for the change in Rule 23, had in mind some improvement in the utilization of the Federal Rules of Civil Procedure as now formulated and adopted, presumably their recommendations were considered by the Supreme Court of the United States, else the amended rule would not have been adopted. Clearly, the defects of the prior rule were to be eliminated.

To adopt the position urged by defendant here has the effect of nullifying what this Court believes is the object and purpose of the amended rule. As this Court views the situation, if defendant's theory is adopted, plaintiff here and those situated with him are limited to the permissive joinder authorized by Rule 20. Surely, the distinguished members of the advisory committee, not to mention the Supreme Court, had something other than this in mind when Rule 23 was modified, otherwise Rule 23 as a practical matter could have been eliminated.

The revisors of the rule acknowledged the difficulty encountered in the use of such terms as "joint", "common" or "secondary" and these features were eliminated from the new rule. Likewise if the Committee's note is to be given any weight, the distinctions of "true", "spurious" and "hybrid" class actions were removed. This is borne out by the statement on page 100 of 39 F.R.D.,

> "The difficulties which would arise if resort where had to separate actions by or against the individual members of the class here furnish the reasons for, and the principal key to, the propriety and value of utilizing the class-action device."

And this is submitted in connection with the statement (p. 103) that in cases where the Court finds that the questions common to the class predominate over the questions affecting individual members that economies can be achieved by the class-action device.

In the case at bar the questions presented would be common to the class. There is no conceivable question that could otherwise predominate here. The Court can see no obstacle to a finding that the questions common to the class predominate over the questions affecting individual members. Furthermore, the conditions required by Rule 23 appear to exist under the allegations in the complaint.

Defendants place their reliance upon the case of *Matzen* v. *Socony Mobil Oil, Company, Inc.*, case W-3426 (unreported), where the Court held that claims united in a class action which are not joint but which, in fact, are separate claims of the individual persons, cannot be aggregated to sustain removal from state court. The rule announced in *Matzen* follows the decision of the Tenth Circuit Court of Appeals in *Aetna Insurance Company* v. *Chicago, Rock Island & Pacific Railroad Co.*, 229 F.2d 584, a case decided before Rule 23 was amended. Significantly, the *Matzen* opinion reads:

> "We hold that aggregation in class suits must be determined by the principles which have heretofore governed aggregation in non-class suits. The claims must be not only common in the sense of a community of interest in the rights asserted, they must be undivided in the sense that they constitute in their totality an integrated right."

The above statement is the correct statement of law, as it existed before Rule 23 was amended. If it be declared the law under amended Rule 23, then there was no purpose in amending the rule for the reasons given by the revisors.

This Court has studied the opinion in the case of *Alvarez et al.* v. *Pan American Life Insurance Company*, No. 22902, March 27, 1967, decided by the Fifth Circuit Court of Appeals, a copy of which was furnished to the

Court by defendant's counsel. It is fairly obvious that if the law announced in *Alvarez* is to be followed, then amended Rule 23 serves little useful purpose. To support the law announced, the Fifth Circuit was required to fall back on the classifications developed under former Rule 23, now condemned and rescinded.

To sustain *Alvarez*, the Court found it necessary to conclude that Rule 82 furnishes the basis for rejecting jurisdiction under Rule 23. It says:

> "These rules shall not be construed to extend or limit the jurisdiction of the United States District Courts . . ."

The Fifth Circuit then falls back on interpretations applied to the jurisdictional problems by the Courts in dealing with "true", "hybrid", or "spurious" classifications which were eliminated by the amended rule.

If it is to be the law that this Court can entertain a class action only when each member of the class to be bound has a claim for more than the jurisdictional amount, that rule should be clearly announced. Support should not rest on rules developed under the former Rule 23. The new rule seems designed to give the trial court substantial discretion in determining whether at the outset, the action can be maintained and if so, to what extent the judgment rendered shall apply. Rule 23(d) is a broad outline of procedure and provides for orders the Court may make in conducting a class action.

The authors of the amended rule must have taken into account the possibility that the position contended for by plaintiff here would result in an unwarranted extension of federal jurisdiction when they placed in the Committee note the following statement (p. 104):

> "The interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action. On the other hand, these interests may be theoretic rather than practical: the class may have a high degree of cohesion and prosecution of the action through representatives would be quite unobjectionable, or the amounts at stake for individuals may be so small that separate suits would be impracticable. The burden that separate suits would impose on the party opposing the class, or upon the court calendars, may also fairly be considered. . ."

The uncertainty of the proper application of present Rule 23 indicates that an early interpretation of it should be clearly made.

The Court will deny the motion of defendant to dismiss for the reason that in the judgment of this Court, none of the grounds stated in the motion to dismiss are sufficient to require dismissal.

The Court will, if application is timely made, permit an appeal to be taken from this order as provided by 28 U.S.C. 1292(b).

Prevailing counsel will prepare, circulate and submit order to be approved and entered by the Court, and which, when entered, shall constitute the order of the Court denying defendant's motion to dismiss.

DATED at Topeka, Kansas this 29th day of May, 1967.

/s/ George Templar
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

OTTO R. COBURN, et al., Plaintiffs,
vs.
GAS SERVICE COMPANY, a Delaware Corporation, Defendant.

Civil Action No. T-4172

Order

On April 14, 1967, the parties appeared by and through their respective counsel of record and presented oral argument to the court on defendant's motion to dismiss for lack of jurisdiction.

During the course of argument it was stipulated by counsel for the parties that the amount of the plaintiff's claim is less than $10,000, and that counsel for plaintiff at this time is not aware of any member of the class whom plaintiff seeks to represent whose individual claim would equal or exceed $10,000.

After hearing argument of counsel, the matter was taken under advisement by the court

Thereafter, having examined the pleadings, the briefs, and being duly advised in the premises, the court issued its Memorandum and Order on the 29th day of May, 1967, which memorandum having been filed with the clerk is incorporated herein and made a part hereof by reference.

For the reasons set forth in the aforesaid memorandum,

IT IS BY THE COURT ORDERED that defendant's motion to dismiss for lack of jurisdiction should be, and it hereby is, overruled.

The court finds and is of the opinion that the above ruling involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of this litigation.

Upon application timely made, the defendant may appeal from this order as provided in 28 U.S.C. 1292(b).

/s/ George Templar

Approved:

C. Arthur Walker
201 1/2 South Summit
Arkansas City, Kansas
and
Collins, Martin, Pringle, Schell & Burns
Wichita Plaza
Wichita, Kansas 67201
By /s/ William V. Crank
Attorneys for Plaintiff

Robert L. Coleman
700 Scarritt Bldg.
Kansas City, Missouri
and
Dale and Hickman
205 Home National Bank Bldg.
Arkansas City, Kansas 67005
and
Fleeson, Gooing, Coulson & Kitch
1600 Wichita Plaza
Wichita, Kansas 67201
By /s/ Gerrit Wormhoudt
Attorneys for Defendant

APPENDIX C

Rule 23, Federal Rules of Civil Procedure, amended February 28, 1966, effective July 1, 1966

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a paractical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters.

The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. As amended Feb. 28, 1966, eff. July 1, 1966.